

MONTGOMERY COUNTY ETHICS COMMISSION

ADVISORY OPINION

The Montgomery County Public Ethics Law permits any person who is subject to that law (or certain other County ethics provisions) to ask the Ethics Commission for an advisory opinion on the meaning or application of the Ethics Law (or those other ethics provisions) to that person.¹

This is an advisory opinion on the meaning, applicability and scope of the “post-county employment restrictions” of Section 19A-13 of the Public Ethics Law, as they will apply to an individual who, although still employed by the County, will soon begin the process of exploring options for “after County” employment. The requester seeks general advice based on a general description of the requester’s responsibilities.

Material Facts

According to the requester:

[T]he essence of my job is to help [a County official] in the development and implementation of [the official’s] agenda. In practice, the job has evolved into a variety of roles, including representing the [official] at hearings and meetings; advising the [official] on [various matters including] policy matters; acting as a liaison between [the official] and certain of [the official’s] subordinates; working with [other] officials at the federal, state, and local level; serving as a “troubleshooter”; and, drawing on my ... background, participating as a member of a County team that negotiates with the private sector on “special projects”

In carrying out my responsibilities, I have always been mindful of the legal and practical limitations on my ability to bind the County, to direct other County employees, to approve or disapprove County action, to set policy, or to decide what action the County will or will

¹ See MONT. CO. CODE §19A-7(a). Unless the requester authorizes disclosure, the Commission must keep the name of the requester confidential. *Id.* Nevertheless, the Commission must: (a) publish each opinion when it is issued unless the Commission finds that the privacy interest of a public employee or other person clearly and substantially outweighs the public's needs to be informed about Commission actions; (b) at least annually must publish a list of all unpublished opinions, with the reason why each opinion was not published; and (c) take all reasonable steps consistent with making the opinion useful for public guidance to keep confidential the identity of any person who is affected by the opinion request. §19A-7(b).

not take on any particular matter. I do not have the authority ... to regulate the private sector, enter into a contract, or direct other employees. Moreover, from the outset, the [official whom I serve] has made it clear that I have no authority to set policy. Rather, my role has been to advise [that official] to work with those who have authority to act on matters that require the involvement of the [official].

* * *

[M]y responsibilities are to monitor, report, and advise the [official] on the actions of others. I do not have “direct administrative or operating authority to approve, disapprove, or otherwise decide government action.” To the extent that I have conveyed to others ... the views, positions, policies, and directives of the [official I serve], I have done so on [the official’s] behalf, as the [official’s] representative, and at [the official’s] direction.

Under these circumstances, I question if my responsibilities fall within the parameters of “significant participation” or “official responsibility concerning a contract.” If they do not, it would appear that Section 19A-13 would not apply to me. I respectfully request an advisory opinion from the Commission on whether the limitations of Section 19A apply to me.

Applicable Law

The “after-county” employment provisions of the Montgomery County Public Ethics Law, which are entitled “Employment of former public employees,” provide as follows:

(a) [*The 10 Year Prohibition.*] A former public employee must not accept employment or assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee *significantly participated in the matter* as a public employee.

(b) [*The 1 Year Prohibition.*] For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement (express, implied, or tacit) with any person or business that contracts with a County agency if the public employee:

(1) *significantly participated in regulating* the person or business; or

(2) had *official responsibility concerning a contract* with the person or business (except a non-discretionary contract with a regulated public utility).²

(c) *Significant participation* means *direct administrative or operating authority to approve, disapprove, or otherwise decide government action with respect to a specific matter*, whether the authority is intermediate or final, exercisable alone or with others, and exercised personally or through subordinates. It ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.³

Analysis

As ordinarily and popularly understood, the term “*significant participation*” would include making recommendations, rendering advice, conducting investigations, and other such activities. Indeed, in construing the term “*participated significantly*” in the post-state-employment provision of the Maryland Public Ethics Law,⁴ the State Ethics Commission has read the term “*participation*” “to include acting or failing to act in one’s official capacity, ‘personally and substantially, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.’”⁵ This ordinary and popularly understood meaning also is expressly stated in federal post-government-employment restrictions,⁶ and, absent more, would be consistent with Montgomery County’s express intent that its Public Ethics Law be liberally construed to accomplish its broad policy goals.⁷ However, the Montgomery County Ethics law defines the term “*significant participation*,” and in contrast to the State Ethics Law or the Federal statute that defines “*participation*” broadly, the County’s definition of “*significant participation*” is relatively narrow:

Significant participation means *direct administrative or operating authority to approve, disapprove, or otherwise decide government action with respect to a specific matter*, whether the authority is

² § 19A-13. (Emphasis added.)

³ § 19A-13(c). (Emphasis added.)

⁴ The State Ethics Law prohibits a former state official or employee from assisting or representing a party “in a case, contract, or other specific matter for compensation if: (i) the matter involves State government; and (ii) the former official or employee *participated significantly* in the matter as an official or employee.” § 15-504 (d) (1). (Emphasis supplied.)

⁵ Opinion No. 82-24 (quoting Opinion 80-17), XVIII COMAR 434, 436 (1982). (Emphasis added.)

⁶ See, e.g., 18 USC § 207 (a)(1)(B) and (i)(2) (For the purposes of a federal statutory restriction on former officers and employees of the executive branch who “*participated personally and substantially*” in a particular matter as a federal officer or employee, “the term ‘*participated*’ means an action taken as an officer or employee through decision, approval, disapproval, *recommendation, the rendering of advice, investigation, or other such action*”). (Emphasis added.)

⁷ See § 19A-2 (d).

intermediate or final, exercisable alone or with others, and exercised personally or through subordinates. It ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.⁸

According to the requester, he or she does not have the authority to approve, disapprove, or otherwise decide government action with respect to any specific matter. It necessarily follows, therefore, that the requester, in the performance of his or her duties, does not *significantly participate in* any matter as that term is narrowly defined for the purposes of the post-county employment provisions of the County Ethics Law. Consequently, the requester is not subject to § 19A-13(a)'s ten-year prohibition on becoming employed by or assisting any party in a case, contract, or other specific matter. For the very same reason, § 19A-13(b)(1)'s one-year prohibition of any employment understanding or arrangement with any person or business that contracts with a County agency would not apply to the requester because he or she has not *significantly participated in regulating* any person or business.

However, unlike the “*significantly participated*” standard for both the ten-year restriction and the 13(b)(1) one-year restriction, the standard for the 13(b)(2) one-year restriction is whether the former public employee had “*official responsibility*” concerning a contract with the person or business. Furthermore, unlike the term “*significant participation*,” the term “*official responsibility*” is not defined in the Montgomery County Ethics law. Therefore, unless there was a contrary legislative intent, “*official responsibility*” is to be given its ordinary meaning for the purposes 13(b)(2), and that meaning would include the responsibility to advise, recommend, and investigate.⁹

Because it is a significant question of statutory construction, we have sought and received legal advice from our legal counsel, the Office of the County Attorney, on the meaning of the term “*official responsibility*” as used in this § 19A-13(b)(2). That Office has advised:

The term “*official responsibility*,” as used in the post-county-employment provision of the Montgomery County Public Ethics Law, means direct administrative or operating authority to approve, disapprove, or otherwise direct government action, and does not include giving advice, making recommendations, or participating as

⁸ MONTGOMERY COUNTY CODE §19A-13(c). (Emphasis added.)

⁹ See, e.g., *U.S. v. Hathaway*, 534 F.2d 386 (1st Cir. 1976), *cert. denied* 429 U.S. 819 (1976). (The Executive Director of a redevelopment authority who had power to render advice and assistance to the Authority had “official responsibility” within the meaning of the Massachusetts bribery statute.) See also, State Ethics Commission Opinion No. 82-25 (quoting Opinion 80-17) (“Participation includes acting or failing to act *in one’s official capacity*, ‘personally and substantially, through approval, disapproval, decision, *recommendation*, *the rendering of advice*, investigation or otherwise.’”)

a member of a County team that negotiates with the private sector on “special projects.”¹⁰

CONCLUSION

Applying the applicable law to the pertinent facts as presented by the requester, the Commission concluded, based on the analysis set forth above and the legal advice contained in the attached Opinion of the Office of the County Attorney, that the requestor is not subject to the post-county-employment restrictions of §19A-13. The Commission noted, however, that should the requester’s responsibilities change before he or she leaves county service or should the material facts be other than presented in his or her request, this Opinion is not binding.

Furthermore, as is its practice when giving “outside employment” and “post-county-employment” advice, the Commission reminded the requester that the Ethics Law’s prohibits: (1) a public employee from intentionally using the prestige of one’s public employment for private gain or the gain of another;¹¹ (2) a public employee or former public employee from disclosing confidential information relating to or maintained by a County agency that is not available to the public;¹² and (3) a public employee or former public employee using confidential information for personal gain or the gain of another.¹³

FOR THE COMMISSION:

Steven A. Shaw
Vice-Chairman
June __, 2002

¹⁰ See May 28, 2002 memorandum from Associate County Attorney Garrett, through Marc P. Hansen, Chief General Counsel, Office of the County Attorney, to Elizabeth Kellar, Chair, Montgomery County Ethics Commission (a copy of which is attached to this Advisory Opinion).

¹¹ MONT. CO. CODE, §19A-14(a) (“A public employee must not intentionally use the prestige of office for private gain or the gain of another.”)

¹² MONT. CO. CODE, §19A-15(a) (“Except when authorized by law, a public employee or former public employee must not disclose confidential information relating to or maintained by a County agency that is not available to the public.”)

¹³ *Id.* (“A public employee or former public employee must not use confidential information for personal gain or the gain of another.”)